

No. 12132.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN D. WALKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Jurisdiction.

Jurisdiction is conferred by Title 28, Sections 1291 and 1294, U. S. C., and Title 26, Section 3224(a), U. S. C.

This is a criminal appeal. Appellant was sentenced on December 13, 1948 [R. 7-8] and filed Notice of Appeal on December 14, 1948 [R. 9] within the time set by law.

Statutes Involved.

Title 26, U. S. C., Sec. 3224:

“(a) Trafficking. It shall be unlawful for any person required to register under the provisions of this part or section 2551(a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551(a).”

Brief Statement of the Case.

This is an appeal from a conviction of appellant on Counts Five, Six, Seven and Eight of the Indictment [R. 6-7]. Appellant, with other defendants, was charged in said Counts on or about September 16, 1948; September 17, 1948; September 20, 1948, and September 22, 1948 [R. 4-5] with selling a narcotic drug, namely, heroin, a derivative of opium, without having registered with the Collector of Internal Revenue as a dealer in said narcotic and without paying the special tax imposed on said dealer by law.

SPECIFICATION OF ERRORS.

1. The indictment, and in particular Counts Five, Six, Seven and Eight thereof, fails to state an offense against the laws of the United States.

I.

The Indictment, and in Particular Counts Five, Six, Seven and Eight Thereof, Fails to State an Offense Against the Laws of the United States.

There is no allegation in the indictment that appellant was required to register. It is the contention of appellant that the failure to allege that appellant was one of the class required to register is fatal to the indictment.

Houston v. U. S., 5 F. 2d 497 (5th Circuit);

Ex parte McGonigle, 2 F. 2d 784 (Dist. Court, Kans., First Division);

United States v. Mercurio, et al., 33 F. 2d 142 (Dist. Court, N. D. New York);

Gerardi v. U. S., 24 F. 2d 189 (1st Circuit);

Smith v. U. S., 17 F. 2d 723 (8th Circuit);

Stokes v. U. S., 39 F. 2d 440 (8th Circuit).

The indictment does not state the heroin was sold in original stamped packages. Section 3228(c), 26 U. S. C., defines wholesale dealer:

“(c) Wholesale Dealer. Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 2553(a) shall be deemed a wholesale dealer.”

The indictment does not state the heroin was sold from original stamped packages. Section 3228(d), 26 U. S. C., defines retail dealer:

“(d) Retail dealer. Every person who sells or dispenses from original stamped packages as provided in section 2553(a) shall be deemed a retail dealer: Provided, That the office, or if none, the residence, of any person shall be considered for the purposes of this part and subchapter A of chapter 23 his place of business. 53 Stat. 384.”

Stokes v. U. S., 39 F. 2d 440 (8th Circuit).

Conclusion.

Appellant respectfully prays that the judgment of conviction be reversed.

Respectfully submitted,

LEO V. SILVERSTEIN,

Attorney for Appellant.